

IN THE HIGH COURT AT CALCUTTA

(Criminal Appellate Jurisdiction)

APPELLATE SIDE

Present:

The Hon'ble Justice Shampa Dutt (Paul)

CRA 265 of 2016

Sk. Azad Ali

Vs

The State of West Bengal.

**For the Appellant
(Legal Aid Counsel)**

: Mr. Apalak Basu.

For the State

**: Mrs. Anasuya Sinha,
Mr. Pinak Kumar Mitra.**

Hearing concluded on

: 19.04.2024

Judgment on

: 13.05.2024

Shampa Dutt (Paul), J.:

The Appeal:-

1. The present appeal has been preferred against a Judgment & Order of Conviction and Sentence dated 18th February, 2016 & 19th February, 2016 passed by the Learned Additional Sessions Judge, Uluberia, District – Howrah in connection with Sessions Trial Case No. 97 (U) of 2015 whereby the Learned Judge was inter alia pleased to convict the present Appellant for the offence punishable under Sections 376/417 of the Indian Penal Code, 1860 and was further pleased to sentence the present Appellant herein to suffer rigorous imprisonment for 7 (seven) years and to pay a fine of Rs. 2000/- i.d. to suffer simple imprisonment for 2 (Two) months more for the offence punishable under Section 376 of the Indian Penal Code, 1860 and also to suffer rigorous imprisonment for 1 (one) year for the offence punishable under Section 417 of the Indian Penal Code, 1860. It was further directed that the previous period of detention, already undergone by the convict shall be set off from the substantive period of sentence in terms of Section 428 of the Code of Criminal Procedure, 1973 and all the sentences so passed against the convict shall run concurrently.

The Prosecution:-

2. The genesis of Sessions Trial Case No. 97 (U) of 2015 relates to a Written Complaint dated 5th May, 2014 made before the Officer-In-Charge, Bagnan Police Station, District – Howrah by one Sajeda Khatun, Daughter of Late Sk. Lalchand, aged about 38 years Resident of Village & Post Office - South Maliya, Police Station- Bagnan, District – Howrah scribed by one Md. Serif, son of Late Asfar, Resident of Village & Post Office – Samaspur, Police Station – Joypur, District – Howrah alleging inter alia that:-

About one year back appellant Sk. Azad Ali who happens to be the friend of her brother used to come to their residence regularly and on that score she had developed acquaintance with him. It is further alleged that due to such long acquaintance Sk. Azad Ali promised to marry her and on simple faith she accepted such proposal and thereafter regularly by taking advantage of her faith he used to mix with her freely as a result of which at present she is pregnant for about 6 months. It is further alleged that when she disclosed about her pregnancy to Sk. Azad Ali he went off to an unknown place and did not keep any contact with her. It is further alleged that on the date of Loksabha Elections in her village i.e. on 30th April, 2014 and thereafter on 1st May, 2014 at 3p.m. she came to know that Sk. Azad Ali in a preplanned manner and ill motive is trying to marry another lady and when she protested she was assaulted by him on her abdomen by kicks, fists, slaps and blows with a view to cause her miscarriage. It is further alleged that when she requested him to marry her she was abused with filthy languages and was told to abort her baby and thereafter he would marry her. It is further alleged that thereafter the respectable persons of the village also requested Sk. Azad Ali to marry her but he refused such request.

3. The prosecution examined seven witnesses in all including the victim.

4. Documents including the medical report have been marked Exhibit 1 to 6.
5. On completion of trial the appellant was convicted and sentenced as stated.

The Evidence:-

6. The victim/complainant was examined as prosecution witness no.1. She has reiterated her case as made out in the Written Complaint. On being cross examined she has denied being married earlier. Her case is that as the Appellant assured her of marriage, she co-habited with him leading to pregnancy and a child. But she then had to face refusal of marriage by the accused/appellant.
7. P.W.2, brother of the complainant has stated on being cross examined that his sister (P.W. 1, the complainant) was earlier married at village Kalyanpur. No Child was born out of that wedlock.
8. **This witness has further stated that the family of the appellant (25 years) did not agree to his marriage with the complainant/victim (36 years).**
9. P.W. 3 is the medical officer who examined the victim/complainant and proved the medical report marked Exhibit 1.
10. P.W.4 is the Judicial Magistrate who has recorded the statement under Section 164 of Cr.P.C. made by the victim/complainant and her friend Mamtaj Begam (P.W.7).

11. P.W. 5, a Co-villager has deposed that during a Salish, the appellant's father assured, of the appellant marrying the complainant, but the promise was not kept. He is also the scribe of the written complaint.
12. P.W. 7, the complainant's friend in her statement under Section 164 of Cr.P.C. has also stated about the complainant's earlier marriage, which allegedly did not last as she was mentally not fit.
13. **In the written argument filed on behalf of the appellant, the following judgments have been relied upon:-**
 - i) *XXXX vs State of M.P., 2024 SCC OnLine SC 241.*
 - ii) *Naim Ahamed vs State (NCT of Delhi), (2023) SCC OnLine SC 89.*
 - iii) *Prashant Bharti vs State (NCT of Delhi), (2013) 9 SCC 293.*
14. The trial Court relying upon the above two rulings upheld the conviction under Section 417 of IPC.

Analysis of Evidence:-

15. Admittedly the victim/complainant was aged 36 years at the time of alleged incident.
16. The appellant was aged 25 years at that time.
17. P.W. 2 brother and P.W.7 friend have both stated that the complainant was married earlier.
18. There is no evidence of the said marriage being dissolved, lawfully.
19. Thus considering the said facts and circumstances and the evidence on record, it appears that the parties initially cohabited. It was when

the complainant became pregnant that there was a 'Salish' and the appellant's father agreed to get them married, a promise which was not kept.

- 20.** In the present case, the allegations in the FIR and the charge sheet, the crucial ingredients of the offence under Section 375 of IPC are absent. The relationship between the parties was purely of a consensual nature. ***(Shambhu Kharwar vs State of Uttar Pradesh & Anr., on 12 August, 2022, (Supreme Court) in Criminal Appeal No. 1231 of 2022).***

- 21.** The Supreme Court in:-

- i. *Kuldeep K. Mahato Vs State of Bihar, decided on 06.08.1998, held:-***

“Then coming to the conviction of the appellant under Section 376 IPC, although both the courts below have held after accepting the evidence of prosecutrix being truthful held that the appellant has forcibly committed the rape, we are of the opinion that the said finding is unsustainable. The prosecutrix had sufficient opportunity not only to run away from the house at Ramgarh but she could have also taken the help of neighbours from the said village. The medical evidence of Dr. Maya Shankar Thakur - P.W.2 also indicates that there were no injuries on the person of the prosecutrix including her private part. Her entire conduct clearly shows that she was a consenting party to the sexual intercourse and if this be so, the conviction of the appellant under Section 376 IPC cannot be sustained. There is one more additional factor which we must mention that it is not the case of the prosecutrix that she was put in physical restraint in the house at Ramgarh, with the result her movements were restricted. This circumstance also goes to negative the case of forcible intercourse with the prosecutrix by the appellant.”

ii. In K.P. Thimmappa Gowda Vs State of Karnataka, in Criminal Appeal No. 1499 of 2004, decided on April 4, 2011, the Supreme Court held:-

“6. The trial court accordingly held that there was no rape as Rathnamma was above 16 years of age and had consented to the act. Subsequently Rathnamma gave birth to a female child on 25.1.1996.”

- 22.** There is no materials or evidence to show that the victim was subjected to forcible intercourse nor is there any evidence to show that there was any resistance offered by the victim. The victim at the relevant time was aged about 36 years.
- 23.** None of the ingredients as required to constitute an offence under Section 375 of IPC punishable under Section 376 of IPC, has been proved in this case against the appellant.
- 24.** The findings of the trial judge is thus clearly not in accordance with law in respect of the offence under Section 376 of IPC and also not on proper appreciation of evidence and thus the Judgment & Order of Conviction and Sentence dated 18th February, 2016 & 19th February, 2016 passed by the Learned Additional Sessions Judge, Uluberia, District – Howrah in connection with Sessions Trial Case No. 97 (U) of 2015 whereby the Learned Judge was inter alia pleased to convict the present Appellant for the offence punishable under Section 376 of the Indian Penal Code, 1860 and sentence the present Appellant herein to suffer rigorous imprisonment for 7 (seven) years and to pay a fine of

Rs. 2000/- i.d. to suffer simple imprisonment for 2 (Two) months more for the offence punishable under Section 376 of the Indian Penal Code, 1860, **is hereby set aside.**

25. The conviction under Section 376 of IPC is thus set aside. The conviction under Section 417 of IPC considering the evidence on record is affirmed.

26. But the sentence is modified as follows:-

The appellant is sentenced to pay a fine of Rs. 10,000/- in default to suffer simple imprisonment for three months for the offence punishable under Section 417 of IPC. Fine if realized is to be paid to the victim/complainant as compensation.

27. CRA 265 of 2016 is thus disposed of.

28. The appellant's bail bonds stands cancelled.

29. The appellant to pay the fine within 30 days from the date of communication of this order in default the trial Court to proceed in accordance with law.

30. All connected applications, if any, stand disposed of.

31. Interim order, if any, stands vacated.

32. Copy of this judgment be sent to the learned Trial Court for necessary compliance.

- 33.** Urgent certified website copy of this judgment, if applied for, be supplied expeditiously after complying with all, necessary legal formalities.

(Shampa Dutt (Paul), J.)